

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NOS. 26949 AND 27181

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

NO. 26949

EDGAR LUCZON IBERA, Petitioner-Appellee, v.
BERT MISHIMA, Respondent-Appellant

AND

NO. 27181

EDGAR LUCZON IBERA, Petitioner-Appellant, v.
BERT MISHIMA, Respondent-Appellee

KHAMAKALO
CLERK OF THE
STATE JUDICIAL COURTS
HAWAII

2007 DEC 11 AM 7:51

FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(Civ. No. 1SS04-1-897)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Nakamura and Fujise, JJ.)

Respondent-Appellant/Appellee Bert Mishima (Mishima) appeals from the orders entered by the District Court of the First Circuit, Honolulu Division¹ (district court) in this injunction-against-harassment case filed by Petitioner-Appellee/Appellant Edgar L. Ibera (Ibera). In Appeal No. 26949, Mishima appeals from the district court's October 13, 2004 Order Granting Petition for Injunction Against Harassment. In Appeal No. 27181, Ibera appeals from the district court's February 14, 2005 Order awarding him \$6,000.00 in attorneys' fees and \$1,404.64 in costs.

Inasmuch as appeal Nos. 26949 and 27181 arise from the same civil case and involve the same parties, the appeals have been consolidated² for assignment and disposition under Appeal

¹ The Honorable Peter T. Stone presided.

² A motion to consolidate Appeal Nos. 26949 and 27181 was approved on January 6, 2006.

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

No. 26949 pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 3(b).³

After a careful review of the issues raised, arguments advanced, law relied upon, and the record in the instant case, we resolve Mishima and Ibera's appeal as follows:

1. The district court did not err when it granted Ibera's Petition For Injunction Against Harassment. Although Mishima challenges the sufficiency of the evidence adduced at the September 30, 2004 hearing on Ibera's petition, he has failed to include the transcripts of the September 30, 2004 and October 13, 2004 proceedings in the record on appeal. Under HRAP Rule 10(b)(3), "[i]f the appellant intends to urge on appeal that a finding . . . is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." "The burden is upon appellant in an appeal to show error by reference to matters in the record, and he or she has the responsibility of providing an adequate transcript." Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) (quoting Union Bldg. Materials Corp. v. The Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)) (internal quotation marks and brackets omitted); see also HRAP Rule 11(a).⁴

Without these transcripts, there is an insufficient record upon

³ Hawai'i Rules of Appellate Procedure (HRAP) Rule 3(b) reads in relevant part: "Appeals may be consolidated by order of either of the Hawai'i appellate courts upon the court's own motion, upon motion of a party, or upon stipulation of the parties to the several appeals."

⁴ HRAP Rule 11(a) reads:

Duty of appellant. After the filing of the notice of appeal, the appellant . . . shall comply with the applicable provisions of Rule 10(b) and shall take any other action necessary to enable the clerk of the court to assemble and transmit the record. It is the responsibility of each appellant to provide a record, as defined in Rule 10(a), that is sufficient to review the points asserted and to pursue appropriate proceedings in the court or agency from which the appeal is taken to correct any omission.

which to review the sufficiency of evidence. Bettencourt, 80 Hawai'i at 231, 909 P.2d at 559 (citations omitted).

Furthermore, the district court's unchallenged findings of fact support the court's decision to grant Ibera's petition for an injunction against harassment. Findings of fact "that are not challenged on appeal are binding on the appellate court." Okada Trucking Co., Ltd. v. Bd. of Water Supply, 97 Hawai'i 450, 458, 40 P.3d 73, 81 (2002). Based on the district court's unchallenged findings of fact,⁵ Mishima intentionally called the police on multiple occasions for no legitimate purpose other than to bar Ibera from participating in judo tournaments by having him arrested and Ibera suffered emotional distress as a result of Mishima's actions. Accordingly, there was sufficient evidence to support the district court's decision to grant the injunction against Mishima under Hawaii Revised Statutes (HRS) § 604-10.5 (Supp. 2006).

Mishima provides this court with no discernible argument as to his third point of error regarding the award of attorneys' fees and costs. Under HRAP Rule 28(b)(7), "[p]oints not argued may be deemed waived[;]" therefore Mishima's last point of error will not be considered. See also Citicorp Mortgage Inc. v. Bartolome, 94 Hawai'i 422, 433, 16 P.2d 827, 838 (2000) ("[a]n appellate court does not have to address matters for which the appellant failed to present discernible argument").

2. The district court did not err in awarding Ibera \$6,000.00 of the requested \$44,208.05 in attorneys' fees. Although "[t]he mere fact that the [district court] reduced the fees without explanation is insufficient for [the appellate

⁵ We review the District Court of the First Circuit's decision without considering the findings of fact identified by Respondent-Appellant/Appellee Bert Mishima (Mishima) in his points on appeal. We note that Mishima's points on appeal merely reference certain findings of fact by number but do not quote them as required by HRAP Rule 28(b)(4)(c). Counsel is cautioned that future violations of the rules will result in sanctions. HRAP Rule 30. Nevertheless, it is the policy of the appellate courts of this State to consider the parties' appeals on the merits, where possible. Housing Fin. & Dev. Corp. v. Ferguson, 91 Hawai'i 81, 85-86, 979 P.2d 1107, 1111-12 (1999).

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

court] to hold that the [district court] abused its discretion[,] the reduction of fees requested must be supported by the record. Finley v. Home Ins. Co. 90 Hawai'i 25, 39, 975 P.2d 1145, 1159 (1998). HRS § 604-10.5(g) "applies only to proceedings to procure a temporary restraining order or injunction pursuant to HRS § 604-10.5." LeMay v. Leander, 92 Hawai'i 614, 627, 994 P.2d 546, 559 (2000).

Ibera's request for attorneys' fees included fees incurred prior to the filing of his petition on July 2, 2004 and related to Ibera's defense and appeal of Mishima's October 28, 2003 injunction against Ibera in a separate action. Additionally, given the legislative intent behind HRS § 604-10.5 to prevent instances of harassment, an award of attorneys' fees in excess of \$44,000.00 stemming from another restraining order would act as a deterrent to parties seeking relief under the statute. See LeMay, 92 Hawai'i at 627, 994 P.2d at 559. Based on the record, Ibera failed to show that the district court abused its discretion in reducing the amount of attorneys' fees awarded to him under HRS § 604-10.5(g).

Lastly, the district court abused its discretion by reducing Ibera's request for costs. The Hawai'i Supreme Court has held that a trial court's reduction of costs without an explanation or readily discernible rationale for the reduction is an abuse of discretion. Wong v. Takeuchi, 88 Hawai'i 46, 52, 961 P.2d 611, 617 (1998); see also Finley, 90 Hawai'i at 38, 975 P.2d at 1158. Although Ibera itemized and requested \$2,354.64 in costs, the district court only awarded him \$1,404.64 in costs and provided no explanation for the reduction of requested costs. Thus, the district court abused its discretion by reducing the amount of requested costs by \$950.00 without explanation or a readily discernible rationale.

Therefore,

IT IS HEREBY ORDERED that the October 13, 2004 Order Granting Petition For Injunction Against Harassment of the District Court of the First Circuit, Honolulu Division is

affirmed. The February 14, 2005 Order is affirmed as to the award of attorneys' fees and vacated as to costs. The case is remanded for further proceedings, consistent with this order, regarding the award of costs.

DATED: Honolulu, Hawai'i, December 11, 2007.

On the briefs:

Dexter T. Higa and
Craig H. Hirai,
for Respondent-
Appellant/Appellee.

Roy Y. Yempuku,
for Petitioner-
Appellee/Appellant.

Corinne K.A. Utaakahe

Presiding Judge

Con H. Kekama

Associate Judge

Amya D.M. Fujita

Associate Judge